BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MATTHEW D. HOFFMAN	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,041,645
ATEC STEEL, LLC	)	
Respondent	)	
AND	)	
	)	
AMERICAN INTERSTATE INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier appealed the November 1, 2010, Award entered by Administrative Law Judge (ALJ) Kenneth J. Hursh. The Workers Compensation Board heard oral argument on February 9, 2011.

APPEARANCES

William L. Phalen of Pittsburg, Kansas, appeared for claimant. Terry J. Torline of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. At oral argument before the Board, the parties stipulated that claimant's average weekly wage without fringe benefits was $932.32 and with fringe benefits it was $1,065.74 effective August 1, 2009.

ISSUES

This is a claim for a back injury. In the November 1, 2010, Award, ALJ Hursh determined (1) claimant's injury arose out of and in the course of employment and by so determining implied the claimant sustained personal injury by accident on July 30, 2008; (2) claimant sustained a 5% whole person functional impairment as a result of the injury;

and (3) claimant was entitled to work disability[1] benefits based upon a 0% task loss[2] and the various percentages of wage loss after claimant's employment with respondent ended.

Respondent contends claimant failed to prove he sustained an accidental injury arising out of and in the course of his employment. It asserts the activities of bending and reaching that claimant was performing when he was allegedly injured are activities of day-to-day living and, therefore, the alleged injury would not be compensable. Respondent also maintains claimant has failed to prove that he suffered any permanent functional impairment and it argues claimant is not entitled to receive work disability benefits.

Claimant requests the Board affirm the November 1, 2010, Award. Claimant argues the awkward physical position required of him while performing his job duties caused his injury and, therefore, he sustained an accidental injury arising out of and in the course of his employment. Claimant asserts he is entitled to receive benefits for his injury.

The issues before the Board on this appeal are:

1. Did claimant sustain personal injury by accident on July 30, 2008?

2. Did claimant sustain an accidental injury that arose out of and in the course of his employment?

3. What is the nature and extent of claimant's injury and disability?

4. Is claimant entitled to future medical treatment?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant began working for Atec Steel, LLC, (Atec) on December 17, 2007.[3] Atec builds large tanks for the storage of oil and corn. On July 30, 2008, claimant was building the bottom of a tank. Prior to welding the tank, the metal had to be cleaned by grinding it. This entailed holding a grinder out at arm's length and bending over in an awkward position. As claimant was grinding, he felt a pop in the middle of his back, ". . . and pain just shot up straight up my back and it was just paralyzed me, I mean not literally, but the

[1] A permanent partial disability under K.S.A. 44-510e that is greater than the whole person functional impairment rating.

[2] The ALJ found the record did not prove a percentage loss of task performing ability.

[3] R.H. Trans., Cl. Ex. 3.

pain just froze me up and I crawled out of there and then went and looked, kind of got my way to the office to let the supervisor know what was happening."[4]

Claimant initially obtained medical treatment from Dr. William Putnam at Freeman Health OccuMed in Joplin, Missouri. Dr. Putnam diagnosed claimant with a pulled muscle and claimant returned to work. After returning to work, claimant's back worsened. He went to his personal physician, Dr. Hamilton, who advised claimant to see a back specialist.[5] Claimant continued to work for Atec until August 1, 2009, when his employment was terminated. Claimant indicated that since leaving employment with Atec he has done nothing to cause a new injury to his back.[6]

After August 1, 2009, claimant's work history was somewhat erratic:

- From August 1, 2009, to November 9, 2009, claimant was unemployed.

- From November 9, 2009, to February 25, 2010, claimant worked part time for Aegis Communications. The ALJ found claimant had an average weekly wage of $304.77 while working at Aegis.

- From February 25, 2010, to June 1, 2010, claimant was unemployed.

- On June 1, 2010, claimant began working for American Ramp Company as a welder. He makes $10.50 per hour and works some overtime. The ALJ determined claimant has an average weekly wage of $509.70 at American Ramp,[7] where he was still working when the record was closed.

Did claimant sustain personal injury by accident on July 30, 2008?

In its brief, respondent alleges claimant did not meet with personal injury at his place of employment on July 30, 2008, and notes the Kansas Workers Compensation Act specifically provides that an injury will not be deemed to have been caused by the employment if it is the result of normal activities of day-to-day living. Respondent then cites K.S.A. 44-508(e), which states:

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[4] *Id.*, at 12.

[5] *Id.*, at 14.

[6] *Id.*, at 16.

[7] ALJ Award (Nov. 1, 2010) at 5.

> 'Personal injury' and 'injury' mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence. An injury shall not be deemed to have been directly caused by the employment where it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living.[8]

The gist of respondent's argument is that claimant was injured while engaged in a normal day-to-day activity.[9] Respondent relies on the cases of *Martin*,[10] *Boeckmann*[11] and *Johnson*[12] to bolster its assertion that claimant was injured while engaged in a normal day-to-day activity. The Board has concluded that the exclusion of normal activities of day-to-day living from the definition of injury was an intent by the Legislature to codify and strengthen the holdings in *Martin* and *Boeckmann.*

Claimant's injury in this case is distinguishable from both *Martin* and *Boeckmann.* While being bent over is an activity which admittedly can occur whether at the workplace or not, being in a captive position while holding a grinder at arm's length and grinding a metal surface is not. Moreover, the Court in *Boeckmann* distinguished cases in which "the injury was shown to be sufficiently related to a particular strain or episode of physical exertion" to support a finding of compensability.[13]

Additionally, claimant's situation is distinguishable from that of the claimant in the *Johnson* case cited in respondent's brief. In *Johnson*, the Kansas Court of Appeals ruled that the act of the claimant standing up from a chair and reaching for a file was a normal activity of day-to-day living and, thus, the resulting injury was not compensable. Here, claimant held a grinder at arm's length while bending over in an awkward position. This is not analogous to the claimant's activities in *Johnson*. The Board concludes that the Legislature did not intend for the "normal activities of day-to-day living" to be so broadly defined as to include injuries caused by the physical exertion of work such as the activity claimant was engaged in at the time he was injured.

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[8] K.S.A. 2008 Supp. 44-508(e).

[9] Respondent's Submission Letter at 3-5 (filed Jan. 5, 2011).

[10] *Martin v. U.S.D. No. 233*, 5 Kan. App. 2d 298, 615 P.2d 168 (1980).

[11] *Boeckmann v. Goodyear Tire & Rubber Co.*, 210 Kan. 733, 504 P.2d 625 (1972).

[12] *Johnson v. Johnson County*, 36 Kan. App. 2d 786, 147 P.3d 1091, *rev. denied* 281 Kan. 1378 (2006).

[13] *Boeckmann*, 210 Kan. at 737.

The Board affirms the ALJ and finds claimant sustained personal injury by accident on July 30, 2008.

Did claimant sustain an accidental injury that arose out of and in the course of his employment?

Respondent never specifically addressed this issue in its brief, but does assert claimant did not meet his burden of proving his injury arose out of and in the course of his employment. A claimant in a workers compensation proceeding has the burden of proof to establish by a preponderance of the credible evidence the right to an award of compensation and to prove the various conditions on which his or her right depends.[14] A claimant must establish that his personal injury was caused by an "accident arising out of and in the course of employment."[15]

Respondent's argument that claimant's injury did not arise out of and in the course of his employment merely repeats its position that claimant was injured while engaged in a normal day-to-day activity. In order for a claimant to collect workers compensation benefits he must suffer an accidental injury that arose out of and in the course of his employment. The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when it is apparent to the rational mind, upon consideration of all circumstances, that there is a causal connection between the conditions under which the work is required to be performed and the resulting injury. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment.[16]

The evidence overwhelmingly points to the fact that claimant suffered personal injury that arose out of and in the course of his employment. Claimant injured himself at the employer's job site during normal work hours. At the time of the accident, claimant was engaged in a work activity that he was ordered to do by his employer. The ALJ correctly concluded: "Here, the claimant was bent over to use a grinder on a storage tank, which is certainly not a day to day living activity."[17] The Board concurs with the ALJ that claimant's injury arose out of and in the course of his employment.

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[14] K.S.A. 2008 Supp. 44-501(a); *Perez v. IBP, Inc.*, 16 Kan. App. 2d 277, 826 P.2d 520 (1991).

[15] K.S.A. 2008 Supp. 44-501(a).

[16] *Newman v. Bennett*, 212 Kan. 562, 512 P.2d 497 (1973).

[17] ALJ Award (Nov. 1, 2010) at 3.

What is the nature and extent of claimant's injury and disability?

The ALJ found claimant has a functional impairment to the body as a whole of 5% in accordance with the AMA *Guides*.[18] This was based on Dr. Edward J. Prostic's opinion.[19] Dr. Prostic diagnosed claimant with a sprain or strain of the thoracic spine and opined it was caused by the work-related injury of July 30, 2008, reported by claimant.[20] Dr. Prostic sent a letter to claimant's attorney on September 18, 2009, that indicated claimant had an impairment rating of 6%.[21] In that report, Dr. Prostic placed no restrictions upon claimant and did not cite the AMA *Guides*. At his deposition, Dr. Prostic testified claimant had a 5% impairment rating in accordance to the *Guides* and gave claimant restrictions of occasionally lifting 60 pounds. Respondent's counsel objected to this testimony as a violation of K.S.A. 44-515.[22]

Respondent states in its brief:

> K.S.A. §44-515 requires that the employer and insurance company must be provided with a copy of the report of any health care provider who has examined and treated the employee. The statute also requires that the report of the health care provider must be identical to the report submitted to the claimant or the claimant's attorney. . . .[23]

In essence, respondent argues that Dr. Prostic was asked to change the opinions in his initial report by claimant's counsel shortly before Dr. Prostic's deposition. Additionally, respondent alleges claimant's counsel requested Dr. Prostic to impose work restrictions upon claimant when none were noted in the original report.

If respondent's argument were adopted, Dr. Prostic would be precluded from providing testimony that was different than his written report. The ALJ determined Dr. Prostic provided a new oral report at his deposition to both claimant and respondent. The ALJ also correctly found "[t]he off-the-cuff nature of Dr. Prostic's opinion goes to its

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[18] ALJ Award (Nov. 1, 2010) at 4-5. The AMA *Guides* refers to the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

[19] Prostic Depo. at 14.

[20] *Id.*, at 11-12.

[21] *Id.*, Ex. 2.

[22] *Id.*, at 12-16.

[23] Respondent's Submission Letter at 6 (filed Jan. 5, 2011).

credibility, not its admissibility."[24] K.S.A. 44-515 is designed to prevent a party from being prejudiced by a medical report they have not previously seen, but that did not occur here. Therefore, this Board finds Dr. Prostic's testimony was permissible pursuant to K.S.A. 44-515.

Dr. John F. McMaster examined claimant at respondent's request and determined claimant "did not sustain a medically or scientifically verifiable occupational musculoskeletal injury, illness or condition."[25] Dr. McMaster indicated claimant had a 0% thoracolumbar/whole person impairment.[26] However, when cross-examined by claimant's counsel, Dr. McMaster admitted he did not take any measurements when performing his range of motion testing, nor did he have actual CDs, x-rays or hard copies of studies at the time he evaluated claimant.[27]

Additionally, the ALJ found the following testimony of Dr. McMaster significant,[28] as does this Board:

> Q. (Ms. Marietta) Doctor, could you tell me the characteristics of a DRE category II impairment rating?
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> A. (Dr. McMaster) Typically, using the Fourth Edition definition, DRE impairment category II involving the thoracolumbar spine involves a minor impairment where there is evidence of a -- clinical signs of an injury without radiculopathy or without loss of motion segment integrity or there is objective evidence of a 25 percent or less than 25 percent compression of the vertebral body or posterior element fractures without dislocation.
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> Q. So under part A, the clinical signs, those are present without radiculopathy; right?
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> A. Yes.
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> Q. And also without the loss of motion segment integrity, correct?
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> A. Yes.[29]

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[24] ALJ Award (Nov. 1, 2010) at 4.

[25] McMaster Depo., Ex. 2 at 4.

[26] *Id.*, at 5-6 and Ex. 2.

[27] *Id.*, at 21-22.

[28] ALJ Award (Nov. 1, 2010) at 4.

[29] McMaster Depo. at 22-23.

This testimony is significant because it supports a DRE Category II rating.

Claimant conveyed to Dr. McMaster that claimant continued having thoracic back pain[30] and complained to Dr. Prostic that he had frequent ache in his upper back. Dr. Prostic noted a CAT scan report showing claimant had chronic T10 superior endplate collapse. Dr. Prostic also took x-rays of claimant's thoracic spine which showed him more predisposed to thoracic injury. Dr. Prostic testified claimant's physical examination was consistent with the mechanism of injury.[31] Dr. Prostic's testimony that clamant suffered a 5% functional impairment to the body as a whole is more credible. Therefore, the ALJ's finding that claimant suffered a 5% functional impairment to the body as a whole is affirmed.

Dr. McMaster indicated claimant had suffered no injury at Atec, had no functional impairment and thus had no work restrictions.[32] Dr. Prostic restricted claimant from occasional lifting of more than 60 pounds.[33] Further, Dr. Prostic testified claimant could no longer perform one of his previous 51 tasks for a task loss of 2%. This opinion is consistent with the remainder of Dr. Prostic's testimony and the Board finds claimant has a 2% task loss.

The work disability is determined by averaging the task loss with the wage loss.[34] The Kansas Supreme Court stated in *Bergstrom*:[35]

> We can find nothing in the language of K.S.A. 44-510e(a) that requires an injured worker to make a good-faith effort to seek out and accept alternate employment. The legislature expressly directed a physician to look to the tasks that the employee performed during the 15-year period preceding the accident and reach an opinion of the percentage that can *[sic]* still be performed. That percentage is averaged together with the difference between the wages the worker was earning at the time of the injury and the wages the worker was earning after the injury. The legislature then placed a limitation on permanent partial general disability compensation when the employee "*is engaging* in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury." (Emphasis added.) K.S.A. 44-510e(a). The legislature did not

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[30] *Id.*, at 21.

[31] Prostic Depo. at 8-10.

[32] McMaster Depo. at 8-9, 11-12 and Ex. 2.

[33] Prostic Depo. at 13.

[34] K.S.A. 44-510e(a).

[35] *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, 214 P.3d 676 (2009).

> state that the employee is required to *attempt to work* or that the employee *is capable of engaging in work* for wages equal to 90% or more of the preinjury average gross weekly wage.[36]

Averaging the 2% task loss with the wage loss figures of claimant, claimant's work disability is as follows:

August 1, 2009, to November 9, 2009 (100% wage loss):	51%
November 9, 2009, to February 25, 2010 (71% wage loss):	36.5%
February 25, 2010, to June 1, 2010 (100% wage loss):	51%
June 1, 2010, forward (52% wage loss):	27%

Is claimant entitled to future medical treatment?

This Order need not address the issue of ongoing medical treatment as there was no request for or indication that claimant was in need of ongoing medical treatment. Future medical treatment, however, will be awarded upon application to and approval of the Director.[37]

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

1. Claimant sustained a personal injury while employed by respondent on July 30, 2008.

2. Claimant's injury arose out of and in the course of his employment.

3. Claimant's average weekly wage without fringe benefits is $932.32 and with fringe benefits is $1,065.74 effective August 1, 2009.

4. Claimant has a 5% functional impairment to the body as a whole.

5. Claimant has a 2% task loss, which results in the work disability as set out above.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.[38] Accordingly, the findings

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[36] *Id.*, at 609-610.

[37] K.S.A. 44-510k.

[38] K.S.A. 2010 Supp. 44-555c(k).

and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board affirms the November 1, 2010, Award entered by Administrative Law Judge Kenneth J. Hursh, except with regard to task loss. Said modification results in the respondent and insurance carrier paying to claimant:

Matthew D. Hoffman is granted compensation from Atec Steel, LLC, and its insurance carrier for a July 30, 2008, accident and the resulting disability.

For the period through July 31, 2009, and based upon an average weekly wage of $932.32, claimant is entitled to receive 20.75 weeks of permanent partial disability benefits at $529 per week, or $10,976.75, for a 5% permanent partial disability.

For the period from August 1, 2009, through November 8, 2009, and based upon an average weekly wage of $1,065.74, claimant is entitled to receive 14.29 weeks of permanent partial disability benefits at $529 per week, or $7,559.41, for a 51% permanent partial disability.

For the period from November 9, 2009, through February 24, 2010, and based upon an average weekly wage of $1,065.74, claimant is entitled to receive 15.43 weeks of permanent partial disability benefits at $529 per week, or $8,162.47, for a 36.5% permanent partial disability.

For the period from February 25, 2010, through May 31, 2010, and based upon an average weekly wage of $1,065.74, claimant is entitled to receive 13.71 weeks of permanent partial disability benefits at $529 per week, or $7,252.59, for a 51% permanent partial disability.

Commencing June 1, 2010, and based upon an average weekly wage of $1,065.74, claimant is entitled to receive 47.87 weeks of permanent partial disability benefits at $529 per week, or $25,323.23, for a 27% permanent partial disability and a total award of $59,274.45.

As of March 15, 2011, claimant is entitled to receive 105.32 weeks of permanent partial disability compensation at $529 per week in the sum of $55,714.28 for a total due and owing of $55,714.28, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of $3,560.17 shall be paid at $529 per week until paid or until further order of the Director.

The Board adopts the remaining orders set forth in the ALJ's Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of March, 2011.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Terry J. Torline, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge